



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY *S.H.*

DATE: May 12, 2004

SUBJECT: COMMENT: PROPOSED AO 2004-13

Transmitted herewith is a timely submitted comment from Ms. Clela Mitchell regarding the above-captioned matter.

Proposed Advisory Opinion 2004-13 is on the agenda for Thursday, May 13, 2004.

Attachment



RECEIVED
FED MAIL
OPERATIONS CENTER

2004 MAY 12 A 10:14

May 12, 2004

FOLEY & LARDNER LLP
ATTORNEYS AT LAW

WASHINGTON HARBOUR
3000 K STREET, N.W., SUITE 500
WASHINGTON, D.C. 20007-5143
202.672.5300 TEL
202.672.5399 FAX
www.foley.com

WRITER'S DIRECT LINE
202.295.4081
cmitchell@foley.com EMAIL

CLIENT/MATTER NUMBER
999100-0130

Mr. Bradley Smith
Chairman
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments Regarding Draft Advisory Opinion 2004-13

Dear Chairman Smith:

These comments are submitted in response to the Draft Advisory Opinion 2004-13. It is noteworthy that the Commission denoted the regulations at 11 C.F.R. §400.1 *et seq* promulgated under the 'Millionaires Amendment' of the Bipartisan Campaign Reform Act of 2002 ("BCRA") as the *Interim* Final Rule. See *Federal Register*, Monday, January 27, 2003. The Commission and the Office of the General Counsel performed yeoman work last year in devising and promulgating regulations under this very complicated section of the statute. In that process, the Commission served notice that the regulations are fully in effect but are subject to revision, presumably after this election cycle, and after the regulated community and the Commission have had the opportunity to experience life under this provision of law and the interim final rule.

With that in mind, it is important that the Commission proceed cautiously – if at all – in making changes in the procedures approved last year for this election cycle. The draft AO represents a change in one of the original premises of the regulations: namely, that the primary and the general are separate elections and the calculations of opposition personal funds begin anew after the primary. While there may be reasons to reconsider that premise, I would urge the Commission not to adopt such changes on a piecemeal basis. Rather, the Commission should either adopt *no* separate advisory opinions or the Commission should incorporate necessary additional principles and changes that must accompany any departure from the original premises of the regulations. The draft AO can only be considered a proposed change in principle and it should be issued only in the context of other provisions of the Millionaires Amendment regulations which are implicated by this change and which also necessitate revision.

Clearly, the definitions in the regulations are premised on the notion of 'separate elections'. The primary and the general elections are defined as 'separate election cycles'. 11 CFR §400.2(b). An opposing candidate is one in the *same* election cycle. 11 CFR §400.3. An increased limit is allowed in response to an expenditure from personal funds, which is defined as made for the purpose of influencing the election *in which he or she is a candidate*. 11 CFR §400.4.

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT
2004 MAY 12 A 11:06

BRUSSELS
CHICAGO
DENVER

DETROIT
JACKSONVILLE
LOS ANGELES
MADISON

MILWAUKEE
ORLANDO
SACRAMENTO
SAN DIEGO

SAN DIEGO/DEL MAR
SAN FRANCISCO
SILICON VALLEY
TALLAHASSEE

TAMPA
TOKYO
WASHINGTON, D.C.
WEST PALM BEACH

002.1198096.2

Mr. Bradley Smith
May 12, 2004
Page 2

The definitions of the 'variables' used to compute the 'opposition personal funds' amount in 11 CFR §400.10 are based on the aggregate amounts of expenditures from personal funds of the candidate/opponent *in the same election*.

The draft AO would now treat the general election *differently* than the manner in which it is treated in the interim final rule. If that is going to be the case, the Commission should consider also changing other provisions of the interim rule through this advisory opinion.

Both the statute and the regulations presuppose that an opponent's expenditure of personal funds must be offset by the candidate's 'gross receipts' 11 CFR §104.3(a)(3)(i), which presumably includes all resources available to the candidate. However, the Commission's regulations specifying how the opposition personal funds calculations are to be performed do not incorporate that principle.

A key problem in the Commission's shifting from the principle of 'separate' elections to a system of 'carryover' to the next election is that the calculations under the regulations are based on the year end reports, not the most recent reports filed by the candidate/opponent. 11 C.F.R. 400.10 (b). ("...as determined on December 31 of the year preceding the year in which the general election is held").

While the draft AO fails to consider or address several important issues, this is the most problematic. Important information required for making the correct calculation of the opposition personal funds amounts is not required to be reported or incorporated into the calculation formulae, resulting from the failure of the current regulations to require ongoing filing and updating of the Form 3Z-1 with each report filed during the entire election cycle.

The key variables in 11 C.F.R. §400.10(b) for the general election are variables *e* and *f*, which state that the amounts for making general election calculations for this election cycle are those reported as of December 31, 2003. No subsequent Form 3Z-1 is required to be filed by any candidate, nor is a candidate required to take into consideration the cash on hand at the conclusion of the primary election or the aggregate contributions raised by his/her campaign subsequent to December 31, 2003 for purposes of calculating the opposition personal funds amount.

Before the Commission moves to eliminate the principle of 'separate elections', the Commission should carefully review the facts and the application of the calculations to the facts in this case. A worksheet showing the difference between the calculations using December 31, 2003 figures and the pre-primary reports of the two campaigns (Schwartz and Brown) illustrates the point.

Mr. Bradley Smith
May 12, 2004
Page 3

DETERMINING 'OPPOSITION PERSONAL FUNDS' AMOUNTS

Definitions:

a = opponent's (Brown) greatest amount of expenditures from personal funds (*made by opponent in same election*)

b = candidate's (Schwartz) greatest amount of expenditures from personal funds (*made by opponent in same election*)

e = aggregate amount of gross receipts of the **candidate's** (Schwartz) authorized committee minus contributions by the candidate (Schwartz) as reported on December 31 of year preceding general election

f = aggregate amount of gross receipts of the **opponent's** (Brown) authorized committee minus contributions by the opponent (Brown) as reported on December 31 of year preceding general election

Formula #3:

After February 1 through general election:

if $e > f$, opposition personal funds
amount = $a - b - ((e - f) \div 2)$

If $e \leq f$, opposition personal funds
amount = $a - b$

Relying on December 31, 2003 Reports, including Form 3Z-1:

STEP ONE: DETERMINING VARIABLES

Candidate: Schwartz

Opponent: Brown

a = opponent's greatest amount of expenditures from personal funds : **a =** \$175,000
(from Form 3Z-1, Dec. 31, 2003)

b = candidate's greatest amount of expenditures from personal funds: **b =** 0

e = aggregate amount of **candidate's** gross receipts \$958,000
minus
contributions by the **candidate** as of December 31 of odd year - 0

e = \$958,000



Mr. Bradley Smith
May 12, 2004
Page 4

f = aggregate amount of opponent's gross receipts	<u>\$408,520</u>
minus	
contributions by the opponent as of December 31 of odd year	- <u>\$175,000</u>
f =	<u>\$233,520</u>

Formula # 3, After February 1, election year through general election:

if $e > f$, opposition personal funds amount = $a - b - ((e - f) \div 2)$

e \$958,000 > f: \$233,520, so:

a \$175,000

minus

b 0

= \$175,000 *

minus

(e \$958,000

minus

f \$233,520

= 724,480 $\div 2$ = 362,240 **)

* \$175,000

minus

** 362,240

= (187,240) opposition personal funds (a negative number)

However, if the Commission regulations required reliance on subsequent filings of the campaigns, the figures would be substantially different for purposes of calculating the opposition personal funds amount, to-wit:



Mr. Bradley Smith
May 12, 2004
Page 5

Relying on Pre-Primary 2004 FEC Reports (reporting through April 7, 2004):

STEP ONE: DETERMINING VARIABLES

Candidate: Schwartz

Opponent: Brown

a = **opponent's** greatest amount of expenditures from personal funds : a = \$175,000

b = **candidate's** greatest amount of expenditures from personal funds: b = 0

e = aggregate amount of **candidate's** gross receipts as of 4/07/04 \$ 1,763,590
minus

contributions by the **candidate** as of 4/07/04 - 0

e = \$ 1,763,590

f = aggregate amount of **opponent's** gross receipts as of 4/07/04 \$565,407
minus

contributions by the **opponent** as of 4/07/04 - \$175,000

f = \$390,407

Formula # 3, After February 1, election year through general election:

if e > f, opposition personal funds amount = a - b - ((e - f) ÷ 2)

e \$1,763,590 > f: \$390,407 , so:

a \$175,000

minus

b 0

= \$175,000 *

minus

(e \$1,763,590

minus

f \$ 390,407

= \$ 1,373,183 ÷ 2 = 686,591.5 **)



Mr. Bradley Smith
May 12, 2004
Page 6

$$\begin{aligned} & * \quad \underline{\$175,000} \\ & \text{minus} \\ & ** \quad \underline{686,591.5} \\ & = \quad \underline{(511,591.5)} \quad \text{opposition personal funds (a negative number)} \end{aligned}$$

These worksheets demonstrate the disparity between the amounts on which the calculations are based, where the opponent's variable data is *current* but the candidate's variable data is based on a December 31, 2003 amount.

In addition, while the draft AO would require that funds contributed by the opposition candidate for the primary and subsequently transferred for use by the opponent in the general election would be considered as contributed for the general election, there is no commensurate recognition in the draft that *all* aggregate funds raised by the candidate and leftover primary funds transferred by the candidate to the general election should also be included in the calculations.

There are other questions and concerns raised by the draft AO that the Commission should consider:

* What is the impact when the 'opposition personal funds' is a negative number? Does the opponent (Brown) have to contribute sufficient personal funds to reach zero *plus* the trigger amount for the general election? Shouldn't Ms. Brown be able to contribute \$187,240 (based on the year end 2003 reports) or \$511,591.50 (if based on the pre-primary report) *plus* another \$350,000 before the increased contribution limits are triggered for Ms. Schwartz? If not, why not?

* What if the candidate has no real primary opposition and is able to raise but doesn't spend funds in the primary, then transfers substantial funds to the general election account albeit not funds contributed by the candidate himself/herself, while the opponent has serious opposition in his/her primary, contributes personal funds to the primary and transfers remaining funds to the opponent's general election account? Are *none* of the cash on hand amounts transferred by the candidate from his/her primary to be counted for purposes of calculating the opposition personal funds in the general election?

* How much of the transferred amounts are to be treated as having been contributed by the opposing candidate? Assuming that the opponent contributed an amount during the primary, how does the Commission propose to calculate how much of any amounts transferred from primary to general election funds are to be attributed to the opponent's personal funds? Is it 100% of amounts transferred? What is the basis for that presumption, particularly when the definitions refer *only* to expenditures in the 'same election'?

For example, suppose the opponent was a novice, unknown candidate who had never before run for political office and to jump start her campaign, contributes \$200,000 to her campaign account at the beginning of the campaign cycle and spends all or most of those funds during the

primary, but because of the initial infusion is able subsequently to raise more than \$200,000 before the primary. The opponent wins the primary, then transfers any remaining cash on hand from the primary to the general election account. Is *all* of the transfer deemed to be contributed by the opponent even though a reasonable FIFO accounting method would demonstrate otherwise? What accounting method is required for this review?

* What if there is primary debt? If the opponent contributes personal funds to retire his/her primary debt, enabling the campaign to dedicate fundraising proceeds solely to the general election, does that trigger an increase in the contribution limits for the general election? In other words, if the funds are contributed by the opposing candidate to the primary account after the date of the primary but are not spent for the general election, why should those personal funds be counted toward the general election opponent's increased contribution limits?

* Shouldn't funds transferred by the candidate (Schwartz) from the primary election to the general election be considered in the opposition personal funds calculation?

Finally, reviewing the cash on hand and the disbursements of the respective candidates (Schwartz and Brown) underscores the need for the Commission to review the totality of the available resources to the respective candidates in the general election in this particular instance because it is instructive in terms of the application of the principles to other campaigns.

December 31, 2003 - Year End Reports:

Candidate Schwartz (Requester)	Total Receipts	\$ 958,000
	No personal funds (Form 3Z-1)	0.00
	Disbursements	\$ 70,624
	Cash on Hand	\$ 847,293
Candidate Brown (general election opponent)	Total Receipts	\$ 408,520
	Personal Funds (Form 3Z-1)	\$ 175,000
	Gross Receipts – Candidate Funds	\$ 233,520
	Disbursements	\$ 32,377
	Cash on hand	\$ 376,143

1st Quarter / Pre-Primary Report, 2004 (no Form 3Z-1):

Candidate Schwartz (Requester)	Total Receipts	\$1,763,590
	Disbursements	\$1,445,625
	Cash on Hand	\$ 203,880
Candidate Brown (general election opponent)	Total Receipts	\$565,407
	Disbursements	\$113,104
	Cash on hand	\$419,900



Mr. Bradley Smith
May 12, 2004
Page 8

It appears that in addition to the substantial complications raised by the draft AO, a careful review of the facts demonstrate that the AOR is theoretical and hypothetical only. The draft AO then ignores consideration *all* the amounts and *all* the variables that should necessarily be included in the calculations.

Obviously, the *disbursements* by Ms. Schwartz in her primary reflect her campaign's access to substantial resources, creating a not insignificant headstart by her campaign in comparison with Ms. Brown's campaign. For the Commission to fail to take into consideration all the relevant facts is to avoid a proper review of the question(s) posed in the AOR.

The Commission should proceed very cautiously before articulating a 'principle' that alters basic premises of the regulations and implicates but doesn't resolve central problems. The draft AO heightens the contradictions within the interim regulations governing the application of the Millionaires Amendment and omits important elements that should be included in the calculations.

While the draft AO *seems* simple enough on its face, that is not the case. There is *nothing* simple about the Millionaires Amendment.

Before the Commission compounds the inherent problem(s) there should be a more thorough review of the facts and implications of the draft AO.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script that reads 'Clea Mitchell'.

Clea Mitchell, Esq.
Attorney at Law

cc: Mr. Larry Norton, General Counsel
Ms. Rosemary Smith